

**SOAH DOCKET NO. 582-07-2673
TCEQ DOCKET NO. 2007-0204-WDW**

APPLICATION OF TEXCOM GULF	§	BEFORE THE STATE OFFICE
DISPOSAL, LLC FOR TEXAS	§	
COMMISSION ON ENVIRONMENTAL	§	OF
QUALITY UNDERGROUND INJECTION	§	
CONTROL PERMIT NOS. WDW410,	§	
WDW411, WDW412 AND WDW 413	§	ADMINISTRATIVE HEARINGS

**APPLICANT TEXCOM GULF DISPOSAL, LLC'S
CONSOLIDATED REPLY TO EXCEPTIONS TO
AMENDED PROPOSAL FOR DECISION**

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MOTION TO STRIKE AND CONSOLIDATED REPLY TO EXCEPTIONS TO THE
AMENDED PROPOSAL FOR DECISION

Pursuant to 30 Tex. Admin. Code § 80.257(a), TexCom Gulf Disposal, LLC, (“*TexCom*” or “*Applicant*”) presents this, its Motion to Strike and Consolidated Reply to Exceptions to the Administrative Law Judges’ (“*ALJs*”) amended Proposal for Decision¹ (“*PFD*”) filed by Protestants Denbury Onshore, LLC (“*Denbury*”) and Lone Star Groundwater Conservation District (“*Lone Star*”) (collectively “*Protestants*”).² Denbury’s and Lone Star’s exceptions basically restate positions that were briefed extensively by the parties,³ carefully reviewed and rejected by the ALJs, and addressed in detail in the PFD and Proposed Order. But, Protestants now rely on a few new approaches, for example documents outside the record and parsed regulatory interpretations, to support their views. Applicant has not previously addressed these new angles now offered by Protestants, and thus does so here. Particularly, and as explained below, Denbury’s and Lone Star’s exceptions rely in part on a document outside the record and, to the extent they do, should be stricken. Otherwise, they should be rejected.

¹ *Amended Proposal for Decision After Remand*, SOAH Docket No. 582-07-2673; TCEQ Docket No. 2007-0204-WDW (Nov. 8, 2010) [hereinafter *PFD*].

² The Aligned Protestants Montgomery County and the City of Conroe’s filing indicates that they have no exceptions to the PFD and Applicant agrees with the Executive Director’s exceptions.

³ See, e.g., Applicant’s Remand Hearing Closing Argument and Response to Closing Argument, incorporated by reference herein.

As discussed in more detail below and its prior briefs, because TexCom proved by a preponderance of the evidence that its application complies with all applicable statutory and regulatory requirements and Protestants do not present any valid exceptions to the PFD, the Texas Commission on Environmental Quality (“*TCEQ*” or the “*Commission*”) should issue Underground Injection Control (“*UIC*”) Permit Nos. WDW410, WDW411, WDW412, and WDW413 and reject Protestants’ exceptions.

I. MOTION TO STRIKE

In an effort to bolster its previously unsuccessful position regarding the sufficiency of the Railroad Commission of Texas’s (“*RRC’s*”) “no-harm” letter, Denbury relies on and attaches to its exceptions as Exhibit A the Examiners’ Report and Proposal for Decision (“*ERPFD*”) issued by the Hearings and Technical Examiners in a RRC contested case hearing and requests that the Commission and ALJs take official notice of it.⁴ Similarly, Lone Star refers to the ERPFD in its exception to Conclusion of Law (“*COL*”) 13 without attaching it.⁵ The record in the above-captioned remand proceeding closed on September 7, 2010, when the parties filed their replies to closing arguments.⁶ The ERPFD was issued on November 19, 2010,⁷ well over two months after the close of the record in this remand proceeding. Accordingly, the ERPFD is not and cannot be

⁴ See Denbury’s Exceptions to the SOAH Proposal for Decision and Findings of Fact and Conclusions of Law at 10 n.27 [hereinafter Denbury’s Exceptions].

⁵ See Lone Star’s Exceptions to PFD and to Findings of Fact and Conclusions of Law at § II [hereinafter Lone Star’s Exceptions].

⁶ See PFD at 6; see also Denbury’s Exceptions at 5.

⁷ See Denbury’s Exceptions Ex. A.

considered part of the record created in this proceeding at the State Office of Administrative Hearings (“*SOAH*”).⁸

Moreover, unlike Federal Register notices and case law that do not require admission into the record as evidence in order to be considered by the ALJs and the Commission, the ERPFD does not carry the weight of law as it has not yet been adopted – or even considered – by the RRC Commissioners. Similar to TCEQ’s contested case hearing procedure, the parties to RRC contested case hearings are afforded the opportunity to file exceptions and replies to exceptions before the RRC considers the ERPFD.⁹ Indeed, regardless of the time set for filing exceptions and replies to exceptions, the RRC cannot consider the ERPFD until the time period for filing post-ERPFD briefing has passed.¹⁰ Having been issued on November 19, 2010, the deadlines for filing exceptions and replies to exceptions,¹¹ and accordingly the date the RRC may consider the

⁸ Under Tex. Gov’t Code § 2001.060, the record in a contested case includes:

- (1) each pleading, motion, and intermediate ruling;
- (2) evidence received or considered;
- (3) a statement of matters officially noticed;
- (4) questions and offers of proof, objections, and rulings on them;
- (5) proposed findings and exceptions;
- (6) each decision, opinion, or report by the officer presiding at the hearing; and
- (7) all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision.

In addition to being issued after the close of the record, it was also issued by members of an agency that are not involved in making the decision in this TCEQ proceeding. *See id.* § 2001.060(7).

⁹ *See* 16 TEX. ADMIN. CODE §§ 1.141-.143 (regarding RRC proposals for decision, the filing of exceptions, and RRC action).

¹⁰ *See id.* § 1.142(c) (“The [RRC] may consider the case upon the expiration of the time for filing exceptions and replies, or after the exceptions and replies are filed (if filed before the filing deadline).”).

¹¹ *See id.* § 1.142(a) (providing 15 days after the date of service of a proposal for decision for any party to file exceptions and 10 days for replies to exceptions).

ERPFD,¹² have not yet passed. Thus, the ERPFD has not yet become “a part of the body of law [the Commission] is required to apply in reasoning toward a decision.”¹³ Because the ERPFD labeled Exhibit A is not in the record and it has no legal weight even if it were legitimately in the record, TexCom respectfully objects to the Commission and ALJs taking official notice of the ERPFD and requests that the portions of Denbury’s and Lone Star’s exceptions relying on the ERPFD be stricken from the record.¹⁴

Alternatively, if the Commission or the ALJs take official notice of the ERPFD, Applicant respectfully requests that the Commission and the ALJs also consider that Denbury was admitted as a party to this remand proceeding under false pretenses. In its Motion to Intervene, Denbury represented that it did not learn of TexCom’s UIC plans until approximately February 2010.¹⁵ After the remand hearing on the merits in this matter, TexCom learned that Denbury was aware of TexCom’s plans to operate a nonhazardous wastewater disposal facility within the area of the Conroe Field since May 2008. Specifically, on May 7, 2008, Johnny Abaldo, a Senior Landman with Denbury, sent an email to Bob Kirkland of Wapiti Energy (“*Wapiti*”) requesting information on the status of TexCom’s project and whether it was causing

¹² See *id.* § 1.142(c).

¹³ *Eckmann v. Des Rosiers*, 940 S.W.2d 394, 399 (Tex. App.—Austin 1997, no writ). For this reason, even if it were officially noticed, the ERPFD would have no significance to this TCEQ proceeding, particularly because the point in time at which the RRC’s “no-harm” letter was relevant has passed. See Applicant’s Response to Closing Argument at 5.

¹⁴ Accordingly, Denbury’s Exceptions at pages 8-12 and Lone Star’s Exceptions § II (regarding COL 13) should be stricken.

¹⁵ See Denbury’s Motion To Intervene, Request For Party Status And Motion For Continuance, Ex. B. ¶ 5 [hereinafter Denbury’s Motion to Intervene].

any issues with Wapiti's ongoing operations.¹⁶ Included on the cc: list were Brad Cox and Bruce Smith.¹⁷

Mr. Smith is the author of a sworn affidavit attached to Denbury's Motion to Intervene.¹⁸ In his affidavit, Mr. Smith identified that he holds the position of Land Manager-Business Development and in that position was in charge of due diligence for Denbury's acquisition of Wapiti's interests in the Conroe Field.¹⁹ Additionally, Mr. Smith indicates that, until one of his colleagues informed him of TexCom's application after the acquisition, the only notice Denbury had of TexCom's UIC application was a newspaper article suggesting that the permit application had been withdrawn.²⁰ Clearly, however, at least one person at Denbury was aware of TexCom's plans since 2008 and Mr. Smith should also have been aware. If the ERPFD is officially noticed by the Commission and the ALJs, the Commission and the ALJs should also consider that Denbury and its witnesses' testimony lack trustworthiness and should not be given any weight, *falsus in uno, falsus in omnibus*.²¹

¹⁶ See Attachment A (Affidavit of Robert W. Kirkland).

¹⁷ See *id.*

¹⁸ See Denbury's Motion to Intervene Ex. A.

¹⁹ See *id.* at ¶¶ 2-3.

²⁰ See *id.* at ¶¶ 3-4.

²¹ See, e.g., TEX. R. EVID. 608 (specifically permitting evidence of truthfulness or untruthfulness to determine the credibility of a witness in light of the Texas Rules of Evidence general prohibition against evidence of bad character); see also PETER T. HOFFMAN, TEXAS RULES OF EVIDENCE HANDBOOK 573-74 (2011) (recognizing that evidence of untruthful character can be used by the trier of fact to determine that, if the witness is generally untruthful, the witness could be untruthful in his or her current testimony).

II. REPLY TO PROTESTANTS' EXCEPTIONS

A. DENBURY'S EXCEPTIONS ARE NOT NEW AND HAVE BEEN RESOLVED

As noted above, the majority of Denbury's exceptions to the PFD have been thoroughly briefed by the parties and resolved by the ALJs, particularly Denbury's claims regarding (1) evidence of impairment to mineral rights,²² (2) the geological suitability of the proposed site, (3) the presence of faults and fractures in the Area of Review ("**AOR**"),²³ (4) the correct permeability value for reservoir modeling,²⁴ (5) the extent of the AOR,²⁵ (6) the ability of the injection zone to contain TexCom's injected wastewater,²⁶ (7) TexCom's calculation of the maximum extent of the waste plume,²⁷ (8) the potential for cross-flow among wellbores,²⁸ (9) the mechanical integrity of the existing well WDW315,²⁹ and (10) the allocation of transcription costs.³⁰ Indeed, with the exception of the remanded issues (i.e., permeability and the extent of the AOR) and transcription costs for the remand hearing, all of the above-listed issues were resolved in the first hearing and were not remanded to SOAH for additional consideration.³¹ No

²² See Denbury's Exceptions at 11-15.

²³ See *id.* at 15-20.

²⁴ See *id.* at 20-22.

²⁵ See *id.* at 22-26.

²⁶ See *id.* at 26-28.

²⁷ See *id.* at 28-30.

²⁸ See *id.* at 30-31.

²⁹ See *id.* at 32-33.

³⁰ See *id.* at 34. Applicant accepts the ALJs' allocation of transcript costs and Denbury does not provide any new or additional evidence that would warrant a different allocation.

³¹ *Interim Order Concerning The Administrative Law Judges' Proposal For Decision And Order Concerning TexCom Gulf Disposal L.L.C.'S Application For Underground Injection Control (UIC)*

party was allowed to introduce new evidence on these issues and Denbury does not now provide any new arguments or revelations that justify any reconsideration by the ALJs or the Commission.

Specifically, regardless of Denbury's strained interpretation of Tex. Water Code § 27.015,³² Denbury refuses to acknowledge that the ALJs specifically excluded all evidence of mineral interest impairment³³ and the geologic suitability of the proposed site (including the ability of the injection zone to contain the injected wastewater) because those issues were sufficiently resolved in the first hearing and not remanded by the Commission for additional consideration in this *remand* hearing.³⁴ Indeed, TexCom has already demonstrated by a

Permit Nos. WDW410, WDW411, WDW412, and WDW413; TCEQ Docket No. 2007-0204-WDW; SOAH Docket No. 582-07-2673, at 1-2 (Dec. 12, 2008) [hereinafter UIC Interim Order].

³² As Applicant explained at the remand hearing on the merits and in its Response to Closing Argument, Denbury contorts legislative history to reach an absurd conclusion regarding the applicability of Tex. Water Code § 27.015 to TexCom's application. *See* Remand Tr. at 7-58 (arguing the merits and objections to Denbury's Motion for Continuance); Applicant's Remand Hearing Response to Closing Argument at 4-5. Denbury's interpretation of the statute cannot be correct. The plain language of Tex. Water Code § 27.015 is not ambiguous. Accordingly, there is no need to look beyond the plain language of the statute to discern its meaning. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 ("[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

³³ *See PFD* at 22-24. For example, TexCom Exhibits 111 and 112 were excluded as beyond the scope of the remand hearing. *See* Remand Tr. at 1824:1-20 (Walston) (excluding additional RRC "no-harm" letters offered by TexCom).

³⁴ *See* Pre-Hr'g Conference Tr. at 21:13 to 22:9 (Walston) (granting Denbury party status, but finding that "any impact on oil or mineral interests was previously considered" and recognizing that, although "a great deal of [Denbury's] motion addresses the potential impact [TexCom's plans] might have on Denbury's mineral interest [t]hat would not be a part of this proceeding") (Apr. 12, 2010); Order No. 24 ("Other issues, such as whether TexCom's injection activities would negatively affect or *impair Denbury's mineral rights or whether the location of the proposed injection wells is geologically suitable* are beyond the scope of this remand proceeding.") (emphasis added); Remand Tr. at 83:1-4 (Walston) ("I'll sustain the objection to the extent your question said 'Did you consider damage to Denbury's mineral interests' because that is beyond the scope.").

preponderance of the evidence that its proposed site is geologically suitable,³⁵ in part because it has been able to adequately identify and characterize the faults and fractures present within the AOR,³⁶ because of the injection zone's ability to contain the injected wastewater,³⁷ and because there is no potential for cross-flow among wellbores.³⁸

Likewise, Denbury also refuses to acknowledge that the purpose of the remand hearing was to allow evidence of modeling using a specific permeability: 80.9 millidarcies ("*mD*").³⁹ Accordingly, the permeability value of 80.9 **must** be considered in this proceeding and Applicant has adequately researched the artificial penetrations within the resulting AOR and beyond.⁴⁰ Additional issues regarding credible evidence of other potential permeability values was briefed in detail in closing arguments⁴¹ and, to the extent there is a new spin on an old tale, also below.⁴²

Finally, Denbury's attempts to mislead the Commission and ALJs regarding the calculation of the extent of the waste plume and the mechanical integrity of the existing well should not be effective. As Applicant has previously noted and the ALJs have acknowledged in

³⁵ See *PFD* at 3, 22-24 & n.49 ("This issue [of geologic suitability] was not remanded and no evidence or argument was received at the remand hearing specifically directed to this issue. . . . [T]he discussion of this issue has been partially modified to place it in context after the remand hearing."); Applicant's Closing Argument at 11-12.

³⁶ See *PFD* at 23, 25-33, 52; Applicant's Remand Hearing Response to Closing Argument at 15-17.

³⁷ See *PFD* at 3, 22-24; *PFD Proposed Order* at 35, FOF 22; Applicant's Closing Argument at 11-12.

³⁸ See *PFD* at 51; Applicant's Remand Hearing Response to Closing Argument at 34-39.

³⁹ See *UIC Interim Order* at 1-2.

⁴⁰ See *PFD* at 42-43; Applicant's Remand Hearing Response to Closing Argument at 34-39; Applicant's Remand Hearing Closing Argument at 22-27.

⁴¹ See *PFD* at 33-43; Applicant's Remand Hearing Response to Closing Argument at 34-39; Applicant's Remand Hearing Closing Argument at 22-27.

⁴² See *infra* § II.D.

their PFD, the calculation of the extent of the plume is a volumetric calculation on which factors such as permeability and the fault's transmissivity have no bearing.⁴³ Additionally, Denbury's criticism of the well's mechanical integrity is an unjustified extension of its unreasonable and scientifically unsupported fear that the injected wastewater will improbably migrate out of the Lower Cockfield into the Upper Cockfield and be produced by Denbury's production wells.⁴⁴ However, as explained previously, the preponderance of the evidence proves that the injected wastewater will remain in the Lower Cockfield injection interval.⁴⁵ Accordingly, Applicant will not encumber the record by repeating its previous arguments in detail here.

B. APPLICANT'S NOTICE COMPLIED WITH APPLICABLE STATUTES AND RULES

This time, Denbury presents in its exceptions the issue of notice to the mineral interest owners as a question of fairness rather than jurisdiction.⁴⁶ Regardless of the framework in which it is considered, however, TexCom complied with TCEQ's rules governing notice of UIC permit applications.⁴⁷

⁴³ See *PFD Proposed Order* at 19, FOF 153; Applicant's Remand Hearing Closing Argument at 14 (noting that no witness disagreed with TexCom's calculation); Applicant's Remand Hearing Closing Argument at 25-26.

⁴⁴ See Denbury's Exceptions at 32-33.

⁴⁵ See Applicant's Exceptions to Amended PFD at 16; Applicant's Remand Hearing Closing Argument at 29-34, 41-48, 60-63.

⁴⁶ See Denbury's Exceptions at 2-8. In previous filings, Denbury complained that TexCom's alleged failure to provide notice of its application to the mineral interest owner deprived the Commission and SOAH of jurisdiction. See *PFD* at 7-11 (concluding that the TCEQ notice requirements for UIC well applications are procedural rather than jurisdictional).

⁴⁷ See *PFD* at 10.

There is no dispute that Denbury is the current operator and lessee of the mineral interests in the Conroe Field unit,⁴⁸ interests which were acquired from Wapiti, who acquired them from Exxon Mobil Corporation (“*Exxon*”).⁴⁹ In August 2005, at the time TexCom submitted its application to TCEQ, Exxon was the lessee and unit operator.⁵⁰ All notices regarding the UIC application were mailed directly to Exxon.⁵¹

Texas courts, including the Supreme Court of Texas, have long recognized that oil and gas leases contain broad implied covenants that obligate *lessees* to “operate with reasonable care” and “seek favorable administrat[ive] action,” among other duties.⁵² “[A]n operator who fails to act as a reasonably prudent operator . . . is liable for loss caused by [that] failure.”⁵³ Accordingly, the Conroe Field unit operator and lessee for the mineral interests within the

⁴⁸ See *PFD Proposed Order* at 8, Finding of Fact (“*FOF*”) 58; see also Denbury’s Motion to Intervene at 5, ¶ 6.b.

⁴⁹ See Applicant’s Response In Opposition To Denbury Onshore LLC’s Plea To The Jurisdiction at 7 (incorporated by reference herein).

⁵⁰ See *id.*

⁵¹ See TexCom Ex. 16 at 12 (Notice of Receipt of Application and Intent to Obtain UIC Permits), Ex. 28 at 15 (Notice of Application and Preliminary Decision); TexCom Preliminary Hearing Exs. 3, 4, and 5 (mailed Notices of Hearing). Additionally, Applicant has previously introduced evidence that Wapiti was aware of TexCom’s application and the initial contested case hearing in this matter. See, e.g., Trial Tr. at 79:6-23 (Ross) (testifying that Wapiti had filed suit against TexCom in Harris County and the litigation was ongoing as of the time of the first hearing on the merits).

⁵² *Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 567 n.1 (Tex. 1981); see also *Green v. Gemini Exploration Co.*, 2003 Tex. App. LEXIS 3703, at *22-23 (Tex. App.—Austin May 1, 2003, pet. denied) (following the Supreme Court’s *Amoco* interpretation of lessees’ duties under oil and gas lease implied covenants). Indeed, some commentators suggest that the duty to seek affirmative administrative action and/or protect the leasehold may also obligate the lessee to contest administrative actions that might negatively affect the lease. See, e.g., 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS 5-45 (1999); Jacqueline L. Weaver, *Implied Covenants in Oil and Gas Law Under Federal Energy Price Regulation*, 34 VAND. L. REV. 1473, 1539 n.256 (1981).

⁵³ *Amoco*, 622 S.W.2d at 570. “The standard of care in testing the performance of implied covenants by lessees is that of a reasonably prudent operator under the same or similar facts and circumstances.” *Id.* at 567-68.

Conroe Field – in this case Denbury – is obligated by its leases to represent the interests of its lessors by seeking favorable administrative action.

In practice, the RRC has determined that because the lessee has a duty to protect the leasehold and to manage and administer the lease, notice of regulatory actions to the mineral interest owner is not required so long as the appropriate lessee receives notice. For example, in 2004, the RRC found that “for the Commission’s regulatory purposes the interests of the [lessors] were represented by [the lessee] pursuant to effective mineral leases”⁵⁴ throughout the application process, which “foreclose[d] any . . . argument by the [lessors] that . . . they should have been provided with notice of the [subject] application.”⁵⁵ Therefore, under the Texas oil and gas law applicable to the oil and gas leases for the Conroe Field, Exxon was the appropriate entity to notify of TexCom’s application and TexCom did so.⁵⁶

⁵⁴ *Commission Called Hearing On The Complaint Of Richard W. Jones And Jerry R. Jones To Show Cause Why Ventex Operating Corp. Is Not Entitled To Produce The Young Lease, Well No. 1, Casady (Strawn) Field, Taylor County, Texas, As Permitted*, Oil and Gas Docket No. 7B-0237703 at 13, Conclusion of Law No. 5 (May 25, 2004) (attached as Ex. TexCom C to Applicant’s Response, *supra* note 49).

⁵⁵ *Id.* at 8. The Supreme Court of Texas has also found that, where the interests of the mineral rights owners and the leaseholders of those mineral rights are aligned, notice to the leaseholder is sufficient to protect the property rights of both parties. *See RRC v. Graford Oil Corp.*, 557 S.W.2d 946, 953-54 (Tex. 1977), *superseded by statute*, TEX. NAT. RES. CODE § 85.046, 86.012 (regarding “common reservoirs”), *as recognized in RRC v. Pend Oreille Oil & Gas Co.*, 817 S.W.2d 36, 45 (Tex. 1991). Additionally, although the court ultimately determined that the owners of *unleased* interests were entitled to participate in the subject RRC regulatory action, “[t]he question of notice [wa]s not before [the court]” because they “obviously had some sort of notice, or knowledge of the action pending before the Commission because they asked to be heard by the Commission. It is not necessary, therefore, for us to pass upon any notice requirement.” *Graford*, 557 S.W.2d at 953. Likewise, both Wapiti and Denbury, Exxon’s successors in interest, clearly had sufficient notice of TexCom’s application as both have taken action against TexCom in either state courts or through the administrative process.

⁵⁶ *See TexCom Ex. 16 at 12* (Notice of Receipt of Application and Intent to Obtain UIC Permits), *Ex. 28 at 15* (Notice of Application and Preliminary Decision); *TexCom Preliminary Hearing Exs. 3, 4, and 5* (mailed Notices of Hearing).

C. THE EXECUTOR OF THE MINERAL INTEREST HAS NO OBJECTION TO TEXCOM'S APPLICATION AND PERMIT

Denbury avers in its exceptions that TexCom's UIC application should be denied "based on the false and/or misleading statements in the application . . . concerning: (1) ownership of the mineral rights; and (2) mailed notice."⁵⁷ However, as TexCom indicated in its response to Denbury's Plea to the Jurisdiction filed during the remand hearing on the merits, even assuming *arguendo* that notice should have been given to the mineral interest owner, TexCom has also provided notice to the executor of the mineral rights underlying TexCom's property and the adjacent properties.⁵⁸

At the time the application was submitted to TCEQ, TexCom determined that the mineral interests associated with the TexCom property were held by Sempra Energy Production.⁵⁹ In 2007, Sempra Energy Production transferred its rights to PEC Minerals LP.⁶⁰ PEC Minerals LP has executive rights on behalf of the mineral rights owner, a trust,⁶¹ and does not object to TexCom's proposed operations if permitted by TCEQ.⁶² Accordingly, pursuant to 30 Tex. Admin. Code § 305.66, to the extent that the lack of notice of TexCom's UIC application to the Sabine Royalty Trust is significant, TexCom has , in fact, notified the only entity that can be

⁵⁷ Denbury's Exceptions at 36; *see also* 30 TEX. ADMIN. CODE § 305.66(f), (g).

⁵⁸ *See* Applicant's Response, *supra* note 49, at 10.

⁵⁹ *See* Denbury's Exceptions at 36 (referring to a document from TexCom's production, labeled APP100430, which was provided to Denbury in response to its first and second sets of discovery requests).

⁶⁰ *See* Applicant's Response, *supra* note 49, at 10.

⁶¹ *See id.*

⁶² *See id.*

notified, i.e., the executor PEC Minerals LP, and shown that the executor of the mineral interest has no objection to TexCom's application and permit.

D. THERE IS NO CREDIBLE EVIDENCE OF AN AREA OF REVIEW GREATER THAN 4.5 MILES

Despite the ALJs' reliance, at least in part, on Lone Star's expert witness Phil Grant's modeling for the conclusion that a permeability of 80.9 mD was appropriate for purposes of reservoir modeling,⁶³ Lone Star now attempts to use modeling that was not admitted into the evidentiary record to argue that the AOR extends beyond the 4.5 miles TexCom researched pursuant to 30 Tex. Admin. Code § 331.121(a)(2)(A)-(C).⁶⁴

The 2009 fall-off test was conducted in September 2009.⁶⁵ Lone Star prefiled its direct case for Mr. Grant on February 26, 2010.⁶⁶ At that time, Mr. Grant opined that the results of the 2009 fall-off test indicated that the Lower Cockfield has a permeability of less than 50 mD,⁶⁷ but only prefiled the results of the modeling of the Commission-ordered parameters.⁶⁸ Then at the remand hearing, approximately nine months after the 2009 fall-off test and four months after Lone Star prefiled its direct case, Lone Star attempted to introduce modeling to substantiate Mr. Grant's opinion regarding the expanded AOR.⁶⁹ The ALJs excluded this modeling.⁷⁰ Now,

⁶³ See PFD at 76.

⁶⁴ See Lone Star's Exceptions at § I.A.2.

⁶⁵ See PFD at 61.

⁶⁶ See District Ex. 22 (cover dated February 26, 2010).

⁶⁷ See District Ex. 22 at 14:4-5 (Grant).

⁶⁸ See District Exs. 23, 24.

⁶⁹ See Remand Tr. at 613:13 to 620:18 (regarding TexCom's objection to Lone Star's attempt to introduce modeling through Mr. Grant that was not disclosed to the parties until the second day of the remand hearing, June 16, 2010).

however, Lone Star references Mr. Grant's unsubstantiated testimony at the remand hearing as evidence that the AOR extends beyond the 4.5 miles researched by TexCom.⁷¹ The ALJs did not rely on this testimony – or even consider it in their PFD – because it is not credible. Accordingly, neither should the Commission.

E. NON-EXISTENT UIC WELLS DO NOT REQUIRE CONSIDERATION

Without citation to any evidence, Lone Star now argues for the first time that TexCom's, and, presumably, its own expert's formation pressure modeling exercises are deficient because they do not consider potential injection into the same injection zone by Huntsman Petrochemical ("**Huntsman**").⁷² However, despite receiving its UIC permits in 2002,⁷³ there is no evidence that Huntsman has even drilled its UIC wells or has any intention to use them. Indeed, the record evidence proves that Huntsman does not currently use its UIC well permits⁷⁴ because it ships its nonhazardous wastewater to two other counties for disposal.⁷⁵ Regardless, TCEQ's rules and the draft permits require annual monitoring of the pressure buildup in the injection zone⁷⁶ and injection zone annual reports.⁷⁷ Accordingly, in the event that both Huntsman and TexCom are

⁷⁰ See Remand Tr. at 620:17-18.

⁷¹ See Lone Star's Exceptions at § I.A.2.

⁷² See Lone Star's Exceptions at § II (regarding FOF 150).

⁷³ See TexCom Ex. 106 (UIC Permit Nos. WDW383 and WDW384 issued to Huntsman on June 26, 2002).

⁷⁴ See *PFD Proposed Order* at 24, FOF 191.

⁷⁵ See *id.* FOF 193; TexCom Ex. 92 at 17:4-7 (Bost). This fact – that Huntsman currently transports its Class I nonhazardous wastewater out of Montgomery County – cannot be acknowledged without also acknowledging that the Conroe Publicly Owned Treatment Works is not reasonably available to industrial wastewater generators like Huntsman. See Applicant's Exceptions to Amended PFD at 16-18.

⁷⁶ See 30 TEX. ADMIN. CODE § 331.64(h)(2); TexCom Ex. 27 at 4.

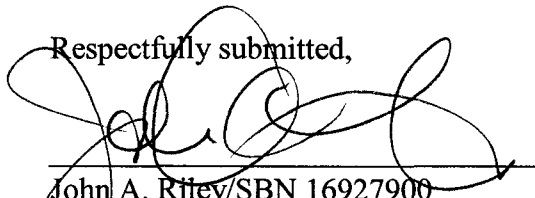
⁷⁷ See 30 TEX. ADMIN. CODE § 331.65(b)(3).

simultaneously injecting into the Lower Cockfield, TCEQ's rules provide the necessary safeguards to detect and address any potentially adverse consequences.

III. CONCLUSION

For the foregoing reasons, TexCom respectfully requests that Protestants' exceptions be stricken or rejected, that the ALJs' Revised Proposed Order be amended as proposed in TexCom's exceptions, and that Permit Nos. WDW410, WDW411, WDW412, and WDW413 issue.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on the following via electronic mail, facsimile, and/or overnight or first class mail on this the 8th day of December 2010:

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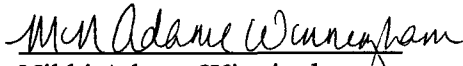
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Nikki Adame Winningham

ATTACHMENT A

AFFIDAVIT OF ROBERT W. KIRKLAND

Robert W. Kirkland, being duly sworn, upon oath states as follows:

1. I am over 21 years of age and have personal knowledge of the matters set forth herein.

2. I am the Senior Vice President of Wapiti Energy, LLC ("Wapiti").

3. In December 2009, Wapiti sold its 95 percent working interest in the Conroe Fieldwide Unit (the "Conroe Field"), Montgomery County, Texas, to Denbury Resources, Inc. ("Denbury") for approximately \$430 million (the "Denbury Acquisition").

4. Prior to the closing of the Denbury Acquisition, Denbury performed significant due diligence in 2008 and 2009.

5. I was in charge of Wapiti's due diligence team, and provided Denbury representatives with access to Wapiti's Conroe Field land, operations and well files.

6. On March 25, 2008, Denbury first inquired about a Confidentiality Agreement regarding the acquisition of Wapiti's interests in the Conroe Field.

7. On May 7, 2008, Johnny Abaldo (a Senior Landman with Denbury) sent me the e-mail attached as Exhibit "A" hereto, as follows:

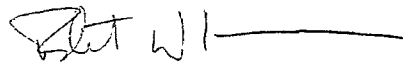
Denbury has been informed of TexCom Gulf Disposal's plan to operate a non-hazardous wastewater facility at Moorehead and Creighton Roads. I believe this falls in [the] Conroe Field. Could you please fill us in on the status of this project and if it [is] causing any issues with your ongoing operations. Thanks for your help.

(E-mail, dated May 7, 2008, Ex. "A.") Denbury representatives Brad Cox and Bruce Smith were also copied on the attached e-mail.

8. In response to Denbury's May 2008 e-mail, Wapiti orally informed Denbury representatives that TexCom had pending applications for permits to operate Class I injection wells in the Conroe Field.

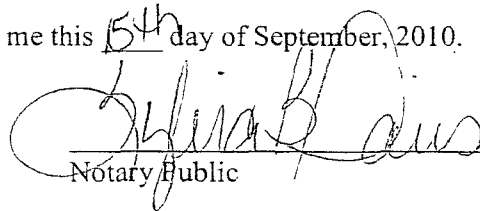
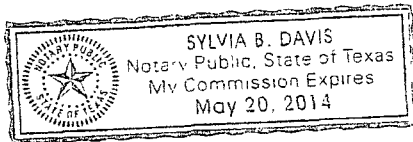
9. The above information about TexCom's permit applications was supplied to Denbury prior to the closing of the Denbury Acquisition.

FURTHER, AFFIANT SAITH NOT.



ROBERT W. KIRKLAND

Subscribed and sworn to before me this 15th day of September, 2010.


Notary Public

From: Johnny Abaldo [mailto:johnny.abaldo@denbury.com]
Sent: Wednesday, May 07, 2008 2:22 PM
To: Bob Kirkland
Cc: Brad Cox; Bruce Smith
Subject: Conroe Field

Bob,

Denbury has been informed of TexCom Gulf Disposal's plan to operate a non-hazardous wastewater facility at Moorehead and Creighton Roads. I believe this falls in Conroe Field. Could you please fill us in on the status of this project and if it causing any issues with your ongoing operations. Thanks for your help.

Sincerely,
Johnny Abaldo
Sr. Landman
Denbury Onshore, LLC
972-673-2144

